No. 89-336

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JEFFREY KRINSK,

Petitioner,

—against—

FUND ASSET MANAGEMENT, INC., MERRILL LYNCH ASSET MANAGEMENT, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., MERRILL LYNCH & CO., INC. and CMA MONEY FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents Fund Asset Management, Inc. ("FAMI"), Merrill Lynch Asset Management, Inc. ("MLAM"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("MLPF&S"), and Merrill Lynch & Co., Inc. ("ML&Co.") (collectively "Merrill Lynch") and the CMA Money Fund (the "Fund") submit this consolidated brief in opposition to the petition for a writ of certiorari.[1]

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1 The disclosures of corporate affiliation required by Sup. Ct. R. 28.1 are set forth in the Appendix to this brief.

PRELIMINARY STATEMENT

Petitioner attempts to conjure up issues warranting this Court's attention by raising factual arguments unanimously rejected by the courts below. In essence, petitioner asks this Court to make a third review of a lengthy and complicated trial record in an attempt to discover what two previous courts have been utterly unable to find—evidence that the fees charged by Merrill Lynch for managing the CMA Money Fund are somehow excessive. The decision below, which unanimously affirmed a detailed, 76 page opinion by the trial court devoted almost exclusively to factual findings, simply applied well-established precedents to a myriad of complex facts. This case presents no conflicts with other decisions, significant legal issues or other "special and important reasons" for granting a writ of certiorari. Sup. Ct. R. 17.

COUNTERSTATEMENT OF THE CASE

Statement of Facts

Petitioner, a shareholder of the CMA Money Fund, brought this action derivatively on behalf of the Fund against FAMI (the Fund's investment adviser), MLAM (FAMI's corporate parent), MLPF&S (a securities broker-dealer and sponsor of the Cash Management Account® Program), ML&Co. (the corporate parent of MLAM and MLPF&S), and the Fund, alleging that Merrill Lynch had received excessive fees for managing the Fund. Petitioner sued primarily under Section 36(b) of the Investment Company Act of 1940 (the "Act"), 15 U.S.C. § 80a-35(b), which imposes a fiduciary duty on an investment adviser with respect to compensation it receives from mutual funds. Petitioner added claims under Sections 12(b), 15(a), and 20(a) of the Act based on essentially the same allegations.

Following a two-week bench trial, the district court issued a comprehensive opinion that considered and rejected each of the factual arguments raised by petitioner, and dismissed his complaint on the merits. *Krinsk* v. *Fund Asset Management, Inc.*,

715 F. Supp. 472 (S.D.N.Y. 1988) (Petition Appendix ("A.") 23). The court of appeals evaluated the trial court's factual findings in light of long-standing precedent, and unanimously affirmed. *Krinsk* v. *Fund Asset Management, Inc.*, 875 F.2d 404 (2d Cir. 1989) (A. 101).

Not surprisingly, petitioner's Statement of the Case omits any significant references to the record below. In essence, petitioner's Statement merely sets forth arguments rejected by the courts below, which he now improperly attempts to retry to this Court. For example, petitioner ignores, among others, the following fundamental facts found by the district court and affirmed by the court below:

— The nature and quality of the services Merrill Lynch provides to Fund shareholders are "of the highest order." 715 F. Supp. at 489 (A. 60).

— The Fund's investment performance has been "superior" and consistently ranks near the top of the money market fund industry. 715 F. Supp. at 488 (A. 58); *see* 875 F.2d at 409 (A. 111).

— The Fund's advisory fee and expense ratio are among the "lowest" in the industry. 715 F. Supp. at 497 (A. 80-81).

— Petitioner suffered a "failure of proof" on the issue of whether Merrill Lynch realizes significant economies of scale in providing services to the Fund and its shareholders. 715 F. Supp. at 496 (A. 79-80).

— The Fund's seven member Board of Trustees, six of whom were neither "affiliated" with nor "interested" persons of Merrill Lynch (*see* 15 U.S.C. §§ 80a-2(a)(3), 10), were "highly qualified for the tasks before them," received "a wealth of information," were assisted in their deliberations by "their own, separate counsel" and "approached their decisions with conscientiousness and care." 715 F. Supp. at 479-82, 501-02 (A. 36-42, 93-95).

— The profitability to Merrill Lynch from managing the Fund falls "well within the realm of reasonableness." 715 F. Supp. at 494, 502 (A. 74, 95). Petitioner's professed "return on equity" analysis (Pet. at 4) was fatally flawed by his failure to develop necessary data, and would have led to the "unreasonable result" of "reduc[ing] the Fund's advisory fee to a level far below that of any other mutual fund." 875 F.2d at 411 (A. 115).

— Petitioner "failed to quantify" any fall-out benefits (*i.e.*, indirect profits to Merrill Lynch attributable in some way to the existence of the Fund), and therefore "advanced no basis" to support his contention that the magnitude of those profits rendered Merrill Lynch's fees excessive. 715 F. Supp. at 494-96 (A. 75-78).

— The Fund's Rule 12b-1 Plan, which compensates MLPF&S sales personnel for selling Fund shares and servicing Fund shareholders, complies with Securities and Exchange Commission Rule 12b-1, 17 C.F.R. § 270.12b-1, and was approved by the Fund's Trustees only after extensive negotiations during which they rejected Merrill Lynch's initial proposals. 715 F. Supp. at 482-85 (A. 43-50).

— The adoption and continuation of the Fund's Rule 12b-1 Plan have benefitted both the Fund and its shareholders by creating an "inflow of assets" which has had "a positive effect on investment performance." 715 F. Supp. at 498-501 (A. 85-93).

Many of petitioner's arguments before this Court rest upon the contention that the Fund is virtually identical to another Merrill Lynch sponsored money market fund, the Merrill Lynch Ready Assets Trust ("MLRAT") and that the fees Merrill Lynch receives for managing the two funds therefore should be identical. (Pet. at 6-7.) In fact, the district court found that MLRAT and the Fund "are significantly different." 715 F. Supp. at 504 (A. 98). The Fund is an integral component of an innovative Cash Management Account® Program ("CMA Pro-

gram") developed by Merrill Lynch which offers investors a far broader array of financial services than does a traditional "stand-alone" money market fund, such as MLRAT. Through a sophisticated computer system, the CMA Program combines (1) a MLPF&S securities brokerage account, (2) a choice of four savings vehicles, including the Fund, into which all cash is automatically invested, (3) a VISA card/checking account, which provides CMA Program participants with convenient access to their cash accounts, plus the margin value of any securities in their securities account, and (4) a comprehensive monthly statement. 715 F. Supp. 476-78 (A. 26-31).[2] Given the significant differences between the Fund and MLRAT, any comparison of their average fees is, as the district court found, "inappropriate." *Id.* at 504 (A. 99).

The Decision Below

The court below applied the district court's factual findings to well-established legal principles, and unanimously affirmed the dismissal of petitioner's complaint. *Krinsk* v. *Fund Asset Management, Inc.*, 875 F.2d 404 (2d Cir. 1989) (A. 101). First, the court rejected petitioner's Section 36(b) claim because none of the relevant facts suggested that Merrill Lynch had breached its fiduciary duty by earning excessive profits from managing the Fund. 875 F.2d at 409-12 (A. 109-19). Second, in holding

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2 Merrill Lynch receives three types of compensation for managing the Fund and operating the CMA Program. First, each individual CMA Program participant pays an annual $65 CMA Program participation fee directly to MLPF&S, regardless of whether the participant chooses to invest in the Fund. 715 F. Supp. at 479, 498 (A. 33-34, 83). Second, the Fund pays FAMI an investment advisory fee pursuant to an investment advisory agreement negotiated each year between FAMI and the Fund's Trustees. During 1984, 1985 and 1986, the Fund paid an effective annual fee of approximately 0.38% of average net assets (*i.e.*, $3.80 for each $1,000 invested in the Fund), one of the lowest advisory fees in the money market fund industry. 715 F. Supp. at 479, 497 (A. 34-35, 81-82). Third, through its Rule 12b-1 Plan, the Fund pays .125% of its net assets to compensate Merrill Lynch sales personnel " 'for selling' Fund shares 'and for providing direct personal services to shareholders.' " 715 F. Supp. at 502 (A. 43). This fee is "one of the least expensive 12b-1 plans in effect." 715 F. Supp. at 482 (A. 44).

that petitioner had no private right of action under Section 12(b) of the Act, the court below carefully followed the principles of *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny, and at the same time preserved the rights of shareholders to contest Rule 12b-1 plans by bringing an action pursuant to Section 36(b). 875 F.2d at 412-13 (A. 119-20). Third, in affirming the dismissal of petitioner's Section 20(a) claim, the court properly applied the standards of *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976). *See* 875 F.2d at 413-14 (A. 121-22). Fourth, the court affirmed the dismissal of petitioner's Section 15(a) claim pursuant to the plain language of that statute and principles central to the concept of shareholder derivative suits. *Id.* at 413 (A. 120-21). Finally, by holding that petitioner had no right to a jury trial for his Section 36(b) and 20(a) claims, the court below followed established precedent of *all* the federal courts that have addressed this issue. *Id.* at 414 (A. 122-23).

REASONS FOR DENYING THE WRIT

I.

REVIEW BY THIS COURT OF PETITIONER'S SECTION 36(b) CLAIM WOULD INVOLVE ONLY QUESTIONS OF FACT APPLIED UNDER PROPER LEGAL STANDARDS

The decision below dismissing petitioner's Section 36(b) claim did not turn on the resolution of any significant questions of law. Rather, the court below applied the proper legal standards under Section 36(b) to the district court's extensive and well-supported findings of fact. Consequently, the court's decision resolved narrow, factually complex issues that do not warrant this Court's attention.

The legal standard followed below has been upheld by *every* court that has addressed a claim of excessive fees under Section 36(b).[3] That test

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3 *Schuyt* v. *Rowe Price Prime Reserve Fund, Inc.*, 663 F. Supp. 962 (S.D.N.Y.), *aff'd*, 835 F.2d 45 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1594 (1988); *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 573

> is essentially *whether the fee schedule represents a charge within the range of what would have been negotiated at arm's-length in the light of all of the surrounding circumstances.* . . . To be guilty of a violation of § 36(b), therefore, the adviser-manager must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining.

Gartenberg v. *Merrill Lynch Asset Management, Inc.*, 694 F.2d 923, 928 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983) (citations omitted; emphasis supplied) (*quoted in Krinsk*, 875 F.2d at 409 (A. 110)). Hardly tantamount to a "corporate waste" rule as petitioner argues (Pet. at 12), this standard is the result of the Second Circuit's comprehensive review of the "tortuous" legislative history of Section 36(b). *Gartenberg*, 694 F.2d at 928-32.[4]

Far from questioning whether fees are "excessively excessive" (Pet. at 14), that standard requires courts to exhaustively review "all pertinent facts" concerning the compensation

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F. Supp. 1293 (S.D.N.Y. 1983), *aff'd*, 740 F.2d 190 (2d Cir. 1984); *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983); *Meyer* v. *Oppenheimer Management Corp.*, 715 F. Supp. 574 (S.D.N.Y. 1989). *Cf. Kamen* v. *Kemper Fin. Servs.*, 659 F. Supp. 1153, 1158 (N.D. Ill.), *mandamus denied*, No. 87-1455 (7th Cir. Apr. 13, 1987), *cert. denied*, 108 S. Ct. 1119 (1988) (citing *Gartenberg* standard with approval). The Securities and Exchange Commission also has cited the *Gartenberg* standard with approval, and urged that it be applied in assessing Rule 12b-1 fees. *See* Payment of Asset-Based Sales Loads by Registered Open-End Management Investment Companies, Investment Co. Act Release No. 16,431, [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,243 at 89,173 (June 10, 1988).

4 In developing this standard, the *Gartenberg* court specifically noted that Congress had rejected a "corporate waste" test in passing Section 36(b). 694 F.2d at 928. The district court below also recognized that petitioner did not have to "meet the standard required to hold a fiduciary liable for corporate waste." 715 F. Supp. at 485 (A. 51).

received for managing a fund, in accordance with specific factors.[5] Those factors include:

> (a) the nature and quality of services provided to fund shareholders; (b) the profitability of the fund to the adviser-manager; (c) fall-out benefits; (d) economies of scale; (e) comparative fee structures; and (f) the independence and conscientiousness of the trustees.

Krinsk, 875 F.2d at 409 (A. 110-11) (footnote omitted). Applying the facts found by the district court, the court below concluded that these factors "all weigh in favor of Merrill Lynch." 875 F.2d at 409 (A. 111).

The Section 36(b) analysis applied below is entirely consistent with the allegedly "conflicting" decisions of the Sixth, Seventh and Eleventh Circuits which petitioner cites. (Pet. at 17-18.) To the extent they are relevant at all, those decisions—which have nothing to do with Section 36(b), the Investment Company Act, or mutual funds—simply confirm that courts should examine

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5 *Gartenberg*, 694 F.2d at 929. As the *Gartenberg* court noted (*id.* at 928-30), the Senate Report accompanying Section 36(b) instructs courts to resolve excessive fee claims by

> look[ing] at *all the facts in connection with the determination and receipt of such compensation*, including all services rendered to the fund or its shareholders and all compensation and payments received, in order to reach a decision as to whether the adviser has properly acted as a fiduciary in relation to such compensation.

S. Rep. No. 184, 91st Cong., 1st Sess. 5 (1969), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4897, 4910 ("Senate Report") (emphasis supplied).

Congress also "recognize[d] the fact that [an] investment adviser is entitled to make a profit," and explained:

> [n]othing in the bill is intended . . . to suggest that a "cost-plus" type of contract would be required. It is not intended to introduce general concepts of rate regulation as applied to public utilities.

Senate Report at 4902 (discussed in *Gartenberg*, 694 F.2d at 928).

the conduct of fiduciaries in light of all relevant facts.[6] The court below did exactly that.

Nor is there any record support for petitioner's contention that Fund shareholders are not getting the "best deal."[7] The lower courts' examination of "all of the surrounding circumstances" that Congress considered important demonstrates just the opposite. In particular, as the court below recognized, the role of a fund's board of directors is "among the most important factors to be examined in evaluating the reasonableness of compensation under section 36(b)." 875 F.2d at 412 (A. 118) (citation omitted).[8] Congress instructed the courts to respect "[a] responsible determination regarding the management fee by the directors" (Senate Report at 4903), and stressed that Section 36(b) does not "authorize a court to substitute its business judgment for that of the mutual fund's board of directors" (*id.* at 4902). And, this Court has emphasized that "Congress entrusted to the independent directors of investment companies . . . the primary responsibility for looking after the interests of the funds' shareholders." *Burks v. Lasker*, 441 U.S. 471, 485 (1979) (footnote omitted); *see also Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 538-40 (1984).

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6 *Stone Mountain Game Ranch, Inc.* v. *Hunt*, 746 F.2d 761 (11th Cir. 1984), mentions in passing the fiduciary duty of a state agency to its residents in the context of a 14th Amendment claim; *United States* v. *Bush*, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976), deals with a municipal official's duty to the citizens of Chicago with respect to his conviction for mail fraud; *Edelman* v. *Fruehauf Corp.*, 798 F.2d 882 (6th Cir. 1986), discussed the duties of a board of directors under state law in accepting a management proposal that would prevent a tender offer.

7 The only "authority" petitioner cites to support his "best deal" standard under Section 36(b) is a statement by one of his counsel's former partners, made at a law school symposium some three years before Congress passed Section 36(b). (Pet. at 17.)

8 Section 36(b)(2) itself specifically provides that approval of a fund's fees by its board of directors "shall be given such consideration by the court as is deemed appropriate under all the circumstances." 15 U.S.C. § 80a-35(b)(2).

Here, the courts below found that the Fund's Trustees were "highly qualified," were kept "fully informed throughout the relevant period as to all matters relevant to any determination for which they were responsible" (715 F. Supp. at 481, 502 (A. 39, 93)), and were "independent and exercised care in their deliberations" (875 F.2d at 412 (A. 118)). As a result, the Trustees did, in fact, negotiate the "best deal" for the Fund and its shareholders. As the courts below recognized, the services Merrill Lynch has provided "have been only of the highest quality" and the fees charged "have been among the lowest of any mutual fund in the industry." 875 F.2d at 409, 412 (A. 111, 117). Further, far from being excessive, Merrill Lynch's profits from managing the Fund were "well within the realm of reasonableness." 715 F. Supp. at 502 (A. 95). Although petitioner contends that the Fund should pay an advisory fee no higher than that paid by MLRAT, the courts below found that the two funds are "significantly different." 715 F. Supp. at 504 (A. 98). Thus, even under petitioner's own proposed standard, the courts below correctly concluded that no violation of Section 36(b) occurred.

In short, the decision below does not direct lower courts to apply an "excessively excessive" or a "corporate waste" standard, as petitioner argues. (Pet. at 12.) The court below found no violation of Section 36(b) because the evidence demonstrated that none of the relevant facts supported petitioner's claim of excessiveness, and the district court had "*no hesitation* in concluding that there was no breach of fiduciary duty." 715 F. Supp. at 503 (A. 96) (emphasis supplied). Far from creating precedent for upholding excessive fees, the decision below simply confirms that courts should reject Section 36(b) claims where the relevant factors "all weigh in favor of [the adviser and its affiliates]." 875 F.2d at 409 (A. 111). Petitioner's request for certiorari with respect to his Section 36(b) claim, therefore, should be denied.

II.

THE COURT BELOW CORRECTLY DISMISSED PETITIONER'S SECTION 12(b) CLAIM

In holding that petitioner had no implied private right of action under Section 12(b), the court below followed the principles set forth in *Cort* v. *Ash*, 422 U.S. 66, 79 (1975), and its progeny. Of the four factors *Cort* articulates for determining whether a federal statute contains an implied right of action, the "central inquiry [is] . . . whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979). Without favorable, or at least ambiguous, congressional intent, the remaining *Cort* factors do not merit consideration. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979); *see also Touche Ross & Co*, 442 U.S. at 571 ("implying a private right of action on the basis of congressional silence is a hazardous enterprise at best." (citations omitted)).[9]

The court below correctly determined that neither the language of Section 12(b) nor the legislative history supports the inference of an implied right. Indeed, Congress' decision to enact the carefully crafted express remedy of Section 36(b) indicates that "when [it] wished to provide a private damages remedy [Congress] knew how to do so and did so expressly." *Touche Ross & Co.*, 442 U.S. at 572 (citations omitted).

In this respect, the decision below is particularly ill-suited for certiorari because it already advances the policy petitioner advocates—the right of fund shareholders to challenge Rule 12b-1 plans. The court below permitted petitioner to challenge the Fund's Rule 12b-1 Plan payments as a breach of fiduciary duty under Section 36(b).[10] As such, the decision permits share-

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9 *See also, e.g., Thompson v. Thompson*, 108 S.Ct. 513 (1988); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *California* v. *Sierra Club*, 451 U.S. 287 (1981); *Middlesex Co. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

10 The decision below also expressly declined to decide whether a private right of action existed to challenge technical violations of Rule 12b-1. 875 F.2d at 413, n.5 (A. 119 n.5).

holders to contest 12b-1 plans under the very standard Rule 12b-1 itself adopts. *See* 17 C.F.R. 270.12b-1(e) (expressly adopting the fiduciary duty standard of Section 36(b) for Rule 12b-1 plans). To permit shareholders to challenge those fees under Section 12(b) as well would, as the court below recognized, circumvent the "specific procedural limitations of [S]ection 36(b)," such as its one-year statute of limitations and its restriction of damages to actual compensation paid. 875 F.2d at 413 (A. 119-20).[11]

Petitioner also fails to cite any case upholding an implied right of action under Section 12(b).[12] His argument that the decision below somehow conflicts with *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982), therefore is without merit. In *Curran*, the Court preserved previously created implied rights of action under specific sections of the Commodities Exchange Act because, when Congress amended that statute in 1974, it "left intact the statutory provisions under which the federal courts had implied a cause of action." *Id.* at

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11 In any event, the district court addressed and rejected each of petitioner's arguments, expressly finding that neither "the Rule 12b-1 plan [nor] any payments thereunder [were] improper"; that "the Fund benefits from the existence of the 12b-1 plan"; and that the Trustees "exercised their business judgment" in approving the plan after considering "the factors set forth in the applicable SEC release [and examining] all of the extensive information provided them by Merrill Lynch . . . ." 715 F. Supp. at 501 (A. 92-93).

12 This case therefore cannot conflict with *Bancroft Convertible Fund, Inc.* v. *Zico Inv. Holdings, Inc.*, 825 F.2d 731 (3d Cir. 1987); *Lessler* v. *Little*, 857 F.2d 866 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 1130 (1989); *Fogel* v. *Chestnutt*, 668 F.2d 100 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982); or *Jerozal* v. *Cash Reserve Management, Inc.*, [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,019 (S.D.N.Y. Aug. 10, 1982), because none of those cases involved either Section 12(b) or the potential circumvention of Section 36(b)'s procedural limitations.

Oddly, petitioner cites *Meyer* v. *Oppenheimer Management Corp.*, 764 F.2d 76 (2d Cir. 1985), as a case upholding a private cause of action. (Pet. at 21.) In fact, the court in *Meyer* expressed doubt as to "whether a private right of action exists for any violation of [Rule 12b-1] or for any violation of a plan approved pursuant to the Rule." *Id.* at 85.

381. Here, by contrast, because no court had ever inferred a private right of action under Section 12(b) or Rule 12b-1 before Congress amended the Act, no "pre-existing remedy" existed for Congress to silently condone. *See, e.g., Sam Wong & Son, Inc.* v. *New York Mercantile Exch.*, 735 F.2d 653 (2d Cir. 1984).[13]

Unable to establish that the court below erred in dismissing the Section 12(b) claim, let alone how that decision implicates national policies, petitioner's request for a writ should be denied.

III.

THE COURT BELOW CORRECTLY DISMISSED PETITIONER'S SECTION 20(a) CLAIM

The court below affirmed the factual findings of the district court with respect to petitioner's Section 20(a) claim, and held that the Fund's 1984 Proxy did not omit material information. Petitioner does not contest the validity of the legal standard applied by the Second Circuit, only—once again—the district court's factual findings.

The court below applied the materiality standard articulated by this Court in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), and reaffirmed in *Basic, Inc.* v. *Levinson*, 108 S. Ct. 978 (1988): that the plaintiff bears the burden of proving " 'a substantial likelihood that a reasonable shareholder would consider [the omitted fact] important in deciding how to vote . . . .' " *Krinsk*, 875 F.2d at 413 (A. 121) (quoting *TSC Industries*, 426 U.S. at 449). Petitioner fails to explain how the court below misapplied this standard by concluding that the shareholders' vote would not have been influenced by the disclosure

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13 Indeed, the SEC did not even promulgate Rule 12b-1 until 1980. Section 12(b) itself simply prohibits investment companies from financing the distribution of their own shares "in contravention of such rules and regulations as the Commission may prescribe. . . ." 15 U.S.C. § 80a-12(b).

of the effective advisory fee of MLRAT, a "significantly different" fund.[14]

Petitioner complains that the decision below somehow conflicts with *Basic, Inc.* v. *Levinson*, 108 S. Ct. 978 (1988). To the contrary, *Basic* expressly reaffirmed the *TSC Industries* "reasonable investor" materiality standard and applied it to the disclosure of preliminary merger negotiations. That standard requires that materiality be determined by analyzing the facts on a case-by-case basis. The courts below did precisely that, and found that the allegedly omitted facts were neither material nor misleading. The decision below warrants no further consideration.

IV.

THE COURT BELOW CORRECTLY DISMISSED PETITIONER'S SECTION 15(a) CLAIM

Petitioner also fails to demonstrate how the court below erred in affirming the dismissal of his Section 15(a) claim, let alone why that decision warrants review by this Court. In refusing to permit petitioner to challenge the CMA Program participation fee apart from Section 36(b), the court below followed the plain language of Section 15(a), which governs only advisory compensation paid by a *mutual fund*. Section 15(a) simply does not apply to non-advisory compensation such as the CMA Program participation fee, which the Fund does not pay and which relates to the CMA Program as a whole, not to the Fund. Petitioner cites no authority to the contrary.

Likewise, petitioner cites no authority explaining how the court below erred by applying a rule central to the concept of

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14 The Fund's 1984 Proxy, in a chart covering the more than forty Merrill Lynch-sponsored mutual funds (A. 172-75), and in compliance with SEC Rule 20a-2(b)(4) (17 C.F.R. § 270.20a-2(b)(4)), did disclose the asset level at which the MLRAT advisory fee was first reduced (the first "breakpoint"). As the district court recognized, the chart did not purport to provide complete fee schedules of the various Merrill Lynch funds, and "alerted readers to the fact that there could be other breakpoints. . . ." 715 F. Supp. at 503 (A. 98).

shareholder derivative suits: that a shareholder bringing a derivative suit may contest only payments made by the Fund, not payments made directly by shareholders of the Fund. Clearly, the lower courts' reasoning in this respect relies on sound principles. *E.g.*, *Cohen* v. *Fund Asset Management, Inc.*, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,433 (S.D.N.Y. Mar. 31, 1980). It calls for no further review.

V.

THE COURT BELOW PROPERLY DENIED PETITIONER'S JURY DEMAND

In affirming the district court's decision to strike petitioner's jury demand, the court of appeals followed uncontroverted precedent. All three Circuit Courts of Appeal to have examined this issue have held that mutual fund shareholders have no right to a jury trial for excessive fee claims under Section 36(b) or for proxy violation claims under Section 20(a). *Schuyt* v. *Rowe Price Prime Reserve Fund, Inc.*, 835 F.2d 45 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1594 (1988); *Kamen* v. *Kemper Fin. Servs.*, 659 F. Supp. 1153 (N.D. Ill.), *mandamus denied*, No. 87-1455 (7th Cir. Apr. 13, 1987), *cert. denied*, 108 S. Ct. 1119 (1988); *In re Evangelist*, 760 F.2d 27, 31 (1st Cir. 1985); *In re Gartenberg*, 636 F.2d 16 (2d Cir. 1980), *cert. denied*, 451 U.S. 910 (1981).

Like these cases, the decision below turns upon a principle amply supported by decisions of this Court—that merely by designating the relief he seeks as "legal damages," petitioner cannot convert his equitable claims into legal claims entitling him to a jury trial. *Ross* v. *Bernhard*, 396 U.S. 531 (1970) (the Seventh Amendment right to a jury trial turns on the actual nature of the claims presented); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 477-78 (1962) ("the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings"). Here, petitioner has never explained how his Section 36(b) and 20(a) claims sought anything except equitable relief—restitution of excessive fees and nullification of the

shareholders' approval of the 1984 investment advisory agreement.[15]

Because petitioner can show no conflict among the circuits with respect to this issue, or any other reason why this issue now calls for this Court's supervision, his petition with respect to his jury trial demand should be denied.

CONCLUSION

For the reasons set forth above and in the decisions below, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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15 Unlike *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972) (Pet. at 27), the Section 20(a) claim did not sound in fraud, but alleged breach of fiduciary duty, which sounds in equity. Thus, petitioner's Section 20(a) claim resembles the proxy claim in *Maldonado* v. *Flynn*, 477 F. Supp. 1007 (S.D.N.Y. 1979) (Weinfeld, J.), where the court struck the plaintiff's jury demand.

APPENDIX

Rule 28.1 Listing

Respondent Fund Asset Management, Inc. is a wholly owned subsidiary of Merrill Lynch Asset Management, Inc. Respondents Merrill Lynch Asset Management, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated are wholly owned subsidiaries of Merrill Lynch & Co. Inc., a publicly-traded corporation. With the following exceptions, all of the direct or indirect subsidiaries of Merrill Lynch & Co. Inc. (and therefore all of the direct or indirect subsidiaries and affiliates of the other corporate respondents) are wholly owned by companies within the Merrill Lynch group and/or by employees of such companies:

C.P.W. Limited; Iran Financial Services Company S.S.K.; Liberty Madison Partners; Merrill Lynch-Ayala International Pte Ltd.; Merrill Lynch/Great Western Mortgage Securities, Inc.; Merrill Lynch-Nomura Management Company, Inc.; Merrill Lynch Trust Company (Jersey) Limited; ISU Companies, Inc.; Merrill Lynch S.A. Distribudora De Titulos E. Valores Mobiliarios; Merrill Lynch Services S.C Ltda.; ML/EQ Real Estate Portfolio L.P.; MLL Displays Inc.; ML Media Opportunity Partners, L.P.; Two Broadway VI Inc.; Wagner Stott Clearing Corp.